No. 80-2018

SUPREME COURT, U.S.
FILED
SEP 25 1981
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In The

Supreme Court of the United States

October Term, 1980

EDWARD THILL,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

Petition For A Writ Of Certiorari To The New York Court Of Appeals

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

PREFATORY NOTE

Respondent's brief confirms what we stated in the Petition, that the State of New York cannot articulate any interest in having the new rule of forfeiture applied retrospectively to Petitioner's 1978 plea.[1] The State also has made no response to

[1] Respondent incorrectly refers to the issue in the State Court as whether by a guilty plea one "waives" the statutory speedy trial claim. Although the Court of Appeals in both *Friscia* and the instant case referred to the concept of "waiver" in its decision, clearly the Court is not speaking of waiver in the traditional sense, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The concept of "forfeiture" is, as argued by Petitioner below, a more useful way to explain the rule announced in *Friscia* and applied in the instant case. See, generally, Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich. L.R. 1214 (1977). The New York Court of Appeals has now apparently adopted this distinction, *People v. Thomas*, 53 N.Y.2d 338, 441 N.Y.S.2d 650, n.2 (1981).

Petitioner's claim, under the Equal Protection Clause, that the manner in which this new rule was applied absolutely and unreasonably deprives him, and others similarly situated, of rights not necessarily lost by those who are *today* confronted with negotiated plea opportunities following improper denial of their statutory speedy trial claims.

However, Respondent's brief does contain an unanticipated, because untenable, claim that the rule announced in *People v. Friscia,* 51 N.Y.2d 845, 433 N.Y.S.2d 754 (1980), applied so detrimentally to Petitioner whose actions had been governed by the prior law, was not "new law." Petitioner replies.

REPLY ARGUMENT

Respondent's brief proceeds upon several premises:

1. That Petitioner's claim is based only upon *People v. Blakley,* 34 N.Y.2d 311, 357 N.Y.S.2d 459 (1974).

2. That *People v. Blakley* decided a claim now embodied in CPL §30.20, as opposed to CPL §30.30, under which Petitioner's claim in the State Court arose.

3. That therefore the Court of Appeals in this case and *People v. Friscia,* deciding claims arising under CPL §30.30, dealt with "different legal issues" than those recognized in *People v. Blakley.* (for text of statutes, see Appendix A.)

These premises are stated by Respondent in support of the single conclusion and argument that

> [t]here was, therefore, no "new law" created by the decision in *Friscia,* and no due process claim is implicated.
> (Respondent's Brief, p. 2).

None of the premises adopted by Respondent are valid. In any event, the conclusion drawn is neither logical nor correct.

Petitioner's due process claim does not arise solely because of *People v. Blakley*.

More recent cases, in both the New York Court of Appeals and the Departments of the Appellate Division, have recognized explicitly or implicitly the right to appeal a denial of a statutory speedy trial claim pursuant to CPL §30.30 notwithstanding a plea of guilty. See Petition pp. 3-4.

At the time of the entry of the plea in this case, New York State Court Rules recognized that a plea of guilty did not result in a forfeiture of a statutory speedy trial claim. The Office of Court Administration Rules are now the repository of the former Rules of The Administrative Board of the Judicial Conference to which Respondent refers.[2] Those rules, 32 NYCRR §29.5 provided and still provide that only

> . . the failure of a defendant to move for release from custody or dismissal of the prosecution under this Part prior to his pleading guilty or standing trial shall constitute a waiver of such rights. . . .

This rule, since it does not contain the time periods specified elsewhere by the Administrative Board Rules, was not affected by the adoption of CPL §30.30.[3]

CCP §668, considered in *People v. Blakley*, is not "embodied" in CPL §30.20, but is more nearly reflected in CPL §30.30.

It is Section 8 of the Code of Criminal Procedure which is now embodied in CPL §30.20. *People v. McLaurin*, 38 N.Y.2d 123, 124, 378 N.Y.S.2d 692, 693 (1975).

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[2]Rules reprinted in Appendix, A-2-3.

[3]The enactment of CPL §30.30 contained the following provision:

> "This act . . . shall be deemed to supersede any rule of the Administrative Board of the Judicial Conference *specifying periods of time within which a criminal action must be brought to trial*. . . . (L. 1972, Ch. 184, §5). (emphasis added)

Civ. Rts. Law §12, CCP §8, and CPL §30.20, though purely statutory, have been regarded as incorporating most of the federal constitutional speedy trial standards. *People v. Taranovich,* 37 N.Y.2d 442, 373 N.Y.S.2d 79 (1975). Often these are treated as involving a federal constitutional claim.

In adopting the CPL in 1971, the New York State legislature did not immediately continue the provisions of CCP §668 or the equivalent, regarding its provisions, such as "next term of court" as archaic and generally ineffectual. With respect to these provisions, as first enacted,

> the CPL neither perpetuates them nor attempts a modernized version in the terms of specific time limitations. . . . if specific time periods are feasible, these should be determined by a special study and action of a specialized legislative or administrative agency. (Richard G. Denzer, Practice Commentary, McKinney's Consolidated Laws, 11 A, Criminal Procedure Law, §30.20, p. 79 [West, 1971]).

Thus, Respondent's statement is inaccurate that "§30.20 is the present embodiment of the speedy trial claims [under §668] raised in *People v. Blakely* [sic]" (Respondent's Brief, p. 4).

The effort to maintain a "time period" definition of the speedy trial right continued with the adoption by the Administrative Board of the Judicial Conference of rules requiring the trial of criminal cases within certain time periods. 22 N.Y.C.R.R. Part 29 The New York legislature then enacted CPL §30.30 (set forth in Petition, Appendix D) effective May 1, 1972, the same date the Administrative Board Rules were to have gone into effect. This legislative enactment "continues the Administrative Board's 'time period' approach to the 'speedy trial' problem." See, Richard G. Denzer, Practice Commentary, McKinney's Consolidated Laws, 11 A, supplementary pamphlet, §30.30, p. 64 (West, 1980). Although CPL §30.30 measures to the time at which the People are ready for trial, as opposed to the time of the trial itself, as a method

for enforcing the "time period" approach, the distinction between a "speedy trial" and "ready trial" rule to which Respondent refers has only been utilized by the Court of Appeals in deciding how to apply the statute in different cases. E.G. *People v. Osgood*, 52 N.Y.2d 37, 436 N.Y.S.2d 213 (1981). It is not a distinction relevant to, or relied upon by the Court of Appeals in the instant case.

The distinction which is relevant, as recognized in the language of the Court of Appeals, is whether the particular speedy trial claim raised derives from statute or invokes Constitutional rights. Regarding a claim under CPL §30.20, as necessarily raising a constitutional claim, the Court of Appeals determined that the defendant's claim in *Friscia* under §30.20 was not forfeited by a plea of guilty. It is only what the Court of Appeals describes as the "statutory right" to dismissal, CPL §30.30, that the Court of Appeals held forfeited by a plea of guilty. This distinction was perhaps obscured by the obviously inaccurate assertion in Respondent's brief that "the New York courts have always treated the statutory speedy trial rights as if they were functionally equivalent to the Sixth Amendment rights." (Respondent's Brief, p. 4).

The similarity between CCP §668 and CPL §30.30 is far more substantial than any difference described by Respondent. There is a continuity between CCP §668, the Administrative Board rules, and CPL §30.30. The two statutes are merely different approaches to placing the burden on the State to ensure the forward progress of criminal cases according to ascertainable time periods, in default of which the indictment might be dismissed. Any difference between the approach of the former and present speedy trial statutes is not such as to justify a conclusion that, with respect to the procedural question of appealabiltiy of such claims following a plea of guilty, *People v. Blakley* and *People v. Friscia* (and *People v. Thill*) deal with any different legal issues. Neither in *Friscia* nor in the instant case did the Court of Appeals suggest that this

change in the law was compelled by any difference between CCP §668 and CPL §30.30. The Court merely decided to institute the opposite rule.

Indeed, *People v. Blakley,* although deciding a claim under CCP §668, was decided two years after the effective date of CPL §30.30. In ruling on the issue of forfeiture, the Court of Appeals, without differentiating between claims arising under the former CCP §668 and CPL §30.30, stated

> The improper denial of a motion to dismiss the indictment on the grounds that the defendant has not been afforded a speedy trial survives a plea of guilty and may be raised on appeal (*People v. Wallace,* 26 N.Y.2d 371, 310 N.Y.S.2d 44, 258 N.E.2d 904; *People v. Henderson,* 20 N.Y.2d 303, 305, 282 N.Y.S.2d 734, 735, 229 N.E.2d 422, 423; *People v. Chirieleison,* 3 N.Y.2d 170, 164 N.Y.S.2d 726, 143 N.E.2d 914). [34 N.Y.2d at 314, 357 N.Y.S.2d at 461]

Surely had the Court of Appeals in *Blakley* intended or understood this rule to apply only to cases under CCP §668, rather than the existing statute, it would have said so.

The decision in *Blakley* went further in its decision than acknowledged by Respondent. It stated:

> Because the criminal justice system should scrupulously avoid the possibility that a plea of guilty may be tainted by unfairness . . . and because prosecutors should not be allowed to submerge speedy trial challenges, and the societal interests they represent, in plea bargains, we hold that a reduced plea conditioned upon a waiver of a speedy trial claim must be vacated. (34 N.Y.2d at 315, 357 N.Y.S.2d at 462).

Although this holding was unprecedented, the Court of Appeals nevertheless again avoided differentiating between claims under the former CCP and those which might be raised under the then existing CPL. This strongly implies that the same rule of procedure applied under the correlative provision

of the CPL, §30.30. When the "societal interests" mentioned by the Court of Appeals in *Blakley* are reviewed, it is apparent that they are as well reflected in CPL §30.30.

Respondent's sole conclusion and argument is that the rule in *Friscia* was "not new".

This seems to imply that the same rule finds earlier expression in the cases: it does not.

Respondent then suggests that "no defendant could logically conclude that the decision in *People v. Blakely* [sic] . . . meant that claims under CPL §30.30 were also *non-waivable*". (Respondent's Brief p. 5). Of course, the *non-waiver* rule of *Blakley* is not at issue here, only the rule that, upon a plea of guilty, a defendant does not forfeit a right to appeal a denial of a statutory speedy trial claim.[4] As to that rule defendants, and Petitioner Thill included, had every right to believe that *Blakley* continued the practice for all statutory speedy trial claims, especially in the absence of any suggestion in that decision that its holding was limited to cases arising under the statute repealed two years previous.

The New York Court of Appeals has rejected the proposition that its cases applying the speedy trial provisions of the Code of Criminal Procedure are not relevant to cases deciding such claims under the CPL. *People v. Taranovich*, 37 N.Y.2d 442, 373 N.Y.S.2d 79 (1975).

Apart from the cases cited in the Petition, the existence and operation of the rule of non-forfeiture is best demonstrated by

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[4]Given the general rule that a defendant may waive *any* right, the non-waiver rule in *Blakley* surely demonstrates a zeal for the protection of statutory speedy trial claims which enhanced the expectation of Petitioners and others that their right to appeal would not be foreclosed by pleading guilty in the *absence of a formal waiver*.

the failure of the Respondents to raise the claim of forfeiture on Petitioner's initial appeal, and until after the Court of Appeals decisions in *People v. Lomax*, 50 N.Y.2d 351 (1980) and *People v. Brothers*, 50 N.Y.2d 413 (1980); the rule is demonstrated by the very language of those two decisions suggesting that "it may be that a subsequent plea of guilty . . . should be held to have operated as a waiver of the statutory entitlement to dismissal" (50 N.Y.2d at 418), see Petition, p. 4. What better proof of the existence of the rule, and the Court of Appeals' intention to change the rule, than this invitation to prosecutors to urge its demise?

Respondent's conclusion, that the rule of forfeiture in *Friscia* was not a new rule, is finally obtained only by superordination of will over fact and logic.

CONCLUSION

Respondent's treatment of the New York State scheme for protection of speedy trial interests is far more complicated than accurate. Claiming that Petitioner relies exclusively on the 1974 decision, *People v. Blakley*, Respondent endeavors to prove that the *Blakley* decision alone might not have *compelled* the conclusion that claims for dismissal under CPL §30.30, just as under CCP §668, survive guilty pleas. However, in adopting this tactic, Respondent ignores and fails to dispute the fact that this rule is nevertheless the one followed in all New York Courts until the Court of Appeals, *sua sponte*, suggested a change.

Most important, Respondent offers no reason why this Court should not grant the writ as an important opportunity to limit the extent to which overruling decisions *contracting* defendant's rights might be allowed under the Constitution to act

adversely and inequitably with respect to persons who acted in reasonable reliance on prior law.

Respectfully submitted,

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APPENDIX A

APPENDIX A

NEW YORK CIVIL RIGHTS LAW

§12. Rights of persons accused of crime

In all criminal prosecutions, the accused has a right to a speedy and public trial, by an impartial jury, and is entitled to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor. An alien is not entitled to a jury, composed in part of aliens or strangers, in an action or special proceeding civil or criminal.

NEW YORK CODE OF CRIMINAL PROCEDURE

(Repealed, L. 1970 Ch. 996 §1, Effective September 1, 1971)

§8. Rights of defendant in a criminal action

In a criminal action the defendant is entitled

1. To a speedy and public trial,

* * *

§668. When a person indicted is not brought to trial at the next term thereafter.

If a defendant, dicted for a crime whose trial has not been postponed upon his application, be not brought to trial at the next term of the Court in which the indictment is triable, after it is found the Court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown.

APPENDIX A

NEW YORK CRIMINAL PROCEDURE LAW

§30.20 Speedy trial

After a criminal action is commenced, the defendant is entitled to a speedy trial.

§30.30 Speedy trial; time limitation

(Reprinted in part in Petition at Appendix D)

OFFICE OF COURT ADMINISTRATION RULES

22 N.Y.C.R.R. Part 29 (in part)

§29.2 Dismissal of Prosecution Where Trial is Delayed for More Than Six Months

(a) In any criminal cause other than a prosecution for homicide, whether the defendant is in custody or at large on bail or on his own recognizance, the court shall dismiss the prosecution with prejudice, if the cause has not been brought to trial within a period of six months from the date of his arrest, except that, in computing such period of six months, any period specified in section 29.3 shall not be counted.

(b) An order dismissing the prosecution pursuant to this rule may be made only upon application of the defendant on notice to the district attorney or the Attorney General, as the case may be, and after opportunity for hearing.

§29.3 Extensions of Periods for Good Cause

In computing the period of 90 days provided for in section 29.1 and the period of six months provided for in section 29.2, any period of delay as hereinafter specified shall not be counted and the periods provided for in sections 29.1 and 29.2 shall be deemed extended accordingly for good cause:

APPENDIX A — Office of Court Administration Rules
22 N.Y.C.R.R. Part 29 (in part)

(a) Any reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to proceedings for the determination of his competency and the period during which he is incompetent to stand trial, pretrial motions, interlocutory appeals, trial of other charges and the period during which such matters are under consideration by the court;

(b) Any period of delay resulting from an adjournment or continuance granted by the court at the request of the defendant or with his consent, except that no such consent given by a defendant who is not represented by counsel shall be effectual unless the defendant has first been advised by the court of his right to counsel, his rights under this Part and the effect of his consent; or

(c) Any reasonable period of delay resulting from an adjournment or continuance granted by the court at the request of the People, without the defendant's consent:

(1) on a showing by the district attorney or Attorney General, as the case may be, that he requires such adjournment or continuance to obtain evidence material to the People's case which he has been unable to obtain despite the exercise of due diligence and reasonable grounds are shown to warrant the belief that such evidence will become available within such period;

(2) because of the absence or unavailability of the defendant;

(3) because of the detention of the defendant in another jurisdiction, provided the district attorney or Attorney General, as the case may be, has made reasonably diligent efforts to obtain the presence of the defendant for arraignment and trial;

(4) because of the fact that the defendant, through no fault of the court, is not represented by counsel;

(5) because of the defendant's being joined for trial with a codefendant as to whom the time for trial has not run and good cause is not shown for granting a severance; or

(6) because of any other exceptional circumstances which, in the judgment of the court, warrant the granting of such adjournment or continuance.

* * *

§29.5 Waiver by Defendant

A demand for a speedy trial is not necessary for the purpose of invoking the rights conferred by this Part. However, failure of a defendant to move for release from custody or dismissal of the prosecution under this Part prior to his pleading guilty or standing trial shall constitute waiver of such rights, except that this section shall be inapplicable to a defendant not represented by counsel.

§29.6 Expedited Trial

The case of any defendant detained while awaiting trial shall be placed upon an expedited calendar and, so far as practicable, shall be given trial priority.

§29.7 Effective Date

This Part shall take effect on May 1, 1972.